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SUPREME COURT, U.S.

No. 81-2117

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

STATE OF MISSOURI, Petitioner,	STATE OF MISSOURI, Petitioner,	STATE OF MISSOURI, Petitioner,
vs.	vs.	vs.
ANTHONY J. KANE, Respondent;	RAY A. THOMPSON, Respondent;	CHARLES ARNOLD, Respondent.

On Petition for Writ of Certiorari to the Missouri Supreme Court.

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

Constitutional and Statutory Provisions Involved 1

Reasons for Denying the Writ

1. The decisions below rest solely or in addition to the federal constitutional ground upon a state statutory ground, i.e. that §§556.041(1) and 556.046.1(1), RSMo 1978, prohibit conviction for armed criminal action and the underlying felony, when the underlying felony is established by proof of the same or less than all the facts required to prove armed criminal action 1

2. If this Court cannot determine whether the decisions below rest upon a federal constitutional or an adequate and independent state statutory ground, then counsel requests that it vacate the judgments below and remand the cases to the Missouri Supreme Court to consider whether its judgments rest upon the federal constitution, state statutes, or both grounds 8

3. The decision below in State v. Thompson, 629 S.W.2d 369 (Mo. banc 1982) is not a final judgment under 28 U.S.C. §1257, because the case was remanded for resentencing 8

Conclusion 9

Appendix

Order Transferring Case in State v. Thompson, WD 31513 . . . . . .A1

Order Transferring Case in State v. Arnold, WD 31326 . . . . . .A2.

TABLE OF AUTHORITIES

Cases	Pages
California v. Krivada, 409 U.S. 33, 93 S.Ct. 32, 34 L.Ed.2d 45 (1972)	8
Herb v. Pitcairn, 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789 (1945)	7
Illinois v. Vitale, 439 U.S. 974, 99 S.Ct. 554, 58 L.Ed.2d 645 (1978)	8
Missouri v. Hunter, No. 81-1214	2
Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 65 S.Ct. 1475, 89 L.Ed. 2092 (1945)	9
Sours v. State (Sours I), 593 S.W.2d 208 (Mo. banc 1980)	2
Sours v. State (Sours II), 603 S.W.2d 592 (Mo. banc 1980).	2
State v. Arnold, 628 S.W.2d 665 (Mo. 1982)	2, 3, 5
State v. Haggard, 619 S.W.2d 44 (Mo. banc 1981)	2
State v. Hunter, 622 S.W.2d 374 (Mo. App. 1981)	2
State v. Kane, 629 S.W.2d 370 (Mo. App. 1981)	3, 4, 6
State v. Kane, 629 S.W.2d 372 (Mo. banc 1982)	2, 3, 4
State v. Thompson, 629 S.W.2d 361 (Mo. App. 1981)	4, 9
State v. Thompson, 629 S.W.2d 369 (Mo. banc 1982)	2, 3, 8, 9
State ex rel. Westfall v. Ruddy, 621 S.W.2d 42 (Mo. banc 1981)	2, 3, 5, 6, 7, 8
Constitutional Provisions	
United States Constitution, Fifth Amendment	2, 8, 9
Statutes	
28 U.S.C. §1257	2, 8
Section 559.225, RSMo Supp. 1976	2
Section 571.015, RSMo 1978	2, 8
Section 556.041, RSMo 1978	1, 2, 3, 5, 7, 8
Section 556.046, RSMo 1978	1, 2, 3, 5, 7, 8
Session Laws	
S.B. 60, 79th General Assembly, 1st Session, Laws of Mo. 1977, p. 658.	2
Orders	
Order Transferring Case in State v. Thompson, WD 31513	4, 6
Order Transferring Case in State v. Arnold, WD 31326	4

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On Petition for Writ of Certiorari to the Missouri Supreme Court.

RESPONDENTS' BRIEF IN OPPOSITION

Respondents ANTHONY J. KANE, RAY A. THOMPSON, and CHARLES ARNOLD respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Missouri Supreme Court opinions in these cases.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents ANTHONY J. KANE, RAY A. THOMPSON and CHARLES ARNOLD add to the constitutional and statutory provisions involved, cited by petitioner at pages 5 through 6 and A-80 through A-85 of its petition, the following statute.

Section 556.046.1, RSMo 1978, reads as follows:

> 556.046. Conviction of included offenses. -- .
> 1. A defendant may be convicted of an offense included in an offense charged in the indictment or information. An offense is so included when
> (1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
> (2) It is specifically denominated by statute as a lesser degree of the offense charged; or
> (3) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein.

REASONS FOR DENYING THE WRIT

1. The decisions below rest solely or in addition to the federal constitutional ground upon an adequate and independent state statutory ground, i.e. that §§556.041(1) and 556.046.1(1), RSMo 1978, prohibit conviction for armed criminal action and the underlying felony, when the underlying felony is established by

proof of the same or less than all the facts required to prove armed criminal action.

Petitioner asserts that the decisions below -- State v. Kane, 629 S.W.2d 372 (Mo. banc 1982); State v. Thompson, 629 S.W.2d 369 (Mo. banc 1982); and State v. Arnold, 628 S.W.2d 665 (Mo. 1982) -- reversing respondents' convictions for armed criminal action, §571.015, RSMo 1978, rest solely upon an erroneously decided federal constitutional ground. Petitioner asserts that the decisions below were decided under the authority of State v. Haggard, 619 S.W.2d 44 (Mo. banc 1981), Sours v. State (Sours II), 603 S.W.2d 592 (Mo. banc 1980) and Sours v. State (Sours I), 593 S.W.2d 208 (Mo. banc 1980), holding the multiple punishment provision of Missouri's virtually identical predecessor armed criminal action statute, §559.225, RSMo Supp. 1976, violative of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. Those decisions are presently being reviewed upon the merits by this Court in Missouri v. Hunter, No. 81-1214 (U.S. April 5, 1982), granting Missouri's petition for certiorari in State v. Hunter, 622 S.W.2d 374 (Mo. App. 1982).

Assuming, but not conceding, for the sake of argument that the multiple punishment provision of Missouri's armed criminal action statute is constitutional and Haggard, Sours I and Sours II are erroneously decided, the decisions below, reversing respondents' convictions for armed criminal action, rest upon a state ground, sufficiently adequate and independent of the federal constitutional ground to prevent this Court from acquiring jurisdiction under 28 U.S.C. §1257 to review the decisions below.

The adequate and independent state ground upon which the decisions below rest is that §§556.041(1) and 556.046.1(1), RSMo 1978, prohibit conviction for armed criminal action and the underlying felony, when the underlying felony is established by the same or less than all the facts required to prove armed criminal action. See, State ex rel Westfall v. Ruddy, 621 S.W.2d 42, 43-45 (Mo. banc 1981). Sections 556.041 and 556.046, RSMo 1978, did not exist prior to January 1, 1979 (S.B. 60, 79th General Assembly, 1st Session, Laws of Mo. 1977, pp. 665, 718) and thus were not available as a ground

for reversing convictions for armed criminal action offenses committed prior to that date. Therefore, the Missouri Supreme Court's reversals of the armed criminal action convictions in Haggard, Sours I and Sours II rest only upon a federal constitutional ground, and the Missouri Supreme Court's reversals in respondents' cases rest solely or also upon an adequate and independent state ground.

The decisions below rest solely or in addition to the federal constitutional ground upon a state statutory ground, i.e. that §§556.041(1) and 556.046.1(1), RSMo 1978, prohibit conviction for armed criminal action and the underlying felony, when the underlying felony is established by the same or less than all the facts required to prove armed criminal action. See, State ex rel. Westfall v. Ruddy, supra, 621 S.W.2d at 43-45. Though the Missouri Supreme Court in the two en banc decisions, Kane and Thompson, did not express any reason, either a federal constitutional or a state statutory one (in both instances the court merely asserted that the Missouri Court of Appeals reversal of the armed criminal action conviction was correct, Kane, supra, 629 S.W.2d at 377, Thompson, supra, 629 S.W.2d at 370) and the court in its divisional decision, Arnold, expressed a federal constitutional reason (Arnold, supra, 628 S.W.2d at 667), the state statutory basis for the court's decisions can be understood from the reasons expressed in the intermediate state appellate court decisions, the reason that court transferred the cases to the state supreme court for ultimate decision, the issues raised in respondents' briefing in the intermediate state appellate court, and the Missouri Supreme Court's specific disapproval of the intermediate state appellate court's rejection in one of the decisions of the state statutory ground as "totally without merit."

The reason expressed by the Missouri Court of Appeals in its opinion filed August 6, 1981 for reversing one of the two convictions in Kane was:

> The determination of defendant's first two points is therefore controlled by State ex rel. Westfall v. Ruddy, 621 S.W.2d 42 decided by the Missouri Supreme Court en banc July 23, 1981.

State v. Kane, 629 S.W.2d 370, 371 (Mo. App. 1981) (emphasis added). No federal constitutional reason was given. If Kane was decided upon a constitutional ground, then Sours I and Sours II

(Haggard had not yet been decided) would have been cited. They were not. The reason expressed by the Missouri Court of Appeals in its opinion filed March 30, 1981 (prior to the Ruddy decision date) for reversing one of the two convictions in Thompson was a federal constitutional one. State v. Thompson, 629 S.W.2d 361, 369 (Mo. App. 1981). The state statutory ground was not discussed. The court changed its federal constitutional reason to a state statutory one, however, when it transferred the case to the Missouri Supreme Court on August 18, 1982 (subsequent to the Ruddy and Kane decision dates) "for the reason set forth in the opinion filed in State v. Anthony Kane, WD 31611 (opinion filed August 6, 1981)." Brief in Opposition, A1. The reason the court transferred Kane was for the Missouri Supreme Court to decide whether the armed criminal action or the underlying felony conviction should be reversed. Kane, supra, 629 S.W.2d at 371-372.[1]

The reason expressed by the Missouri Court of Appeals in its opinion filed March 30, 1981 (the same date as its decision in Thompson and prior to the decision date of Ruddy) for reversing one of the two convictions in Arnold was a federal constitutional one. Petition for Certiorari, A71. The state statutory ground was characterized as "totally without merit." Petition for Certiorari, A70. The case was transferred that day to the Missouri Supreme Court, Brief in Opposition, A2, for it to determine whether an argument by the prosecuting attorney was a comment upon the defendant's right not to testify. Petition for Certiorari, A65, A71, A76-79. Thus, the Missouri Court of Appeals did not have an opportunity to consider Arnold in the light of Ruddy, and the Missouri Supreme Court had no reason to consider Arnold in the light of Ruddy, since the case was transferred to it for another reason. And, it must be noted, three of the five Missouri Supreme Court justices who joined in the opinion

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[1]While realizing that it could elect either the remedy of reversing the underlying felony conviction or remanding the case for a new trial so that the jury could chose for which offense it would convict and assess punishment, the Missouri Supreme Court elected the remedy of reversing the armed criminal action conviction. The court interpreted juries' assessment of the greater punishment upon the underlying felony rather than upon the armed criminal action "in excess of ninety-five percent of the cases" to mean that juries believed they were enhancing the greater sentence for the underlying felony. Kane, supra, 629 S.W.2d at 373, 377.

in Arnold (the remaining two were special justices) joined in the opinion in Ruddy. Arnold, supra, 628 S.W.2d at 666, 671; State ex rel. Westfall v. Ruddy, supra, 621 S.W.2d at 45.

In each of their briefs in the Missouri Court of Appeals, the respondents raised as their first ground for reversing one of their two convictions, independently of the federal constitutional ground, the state statutory ground that §§556.041 (1) and 556.046.1(1), RSMo 1978, prohibit conviction for both amend criminal action and the underlying felony, when the underlying felony is established by proof of the same or less than all the facts required to prove armed criminal action. Separate Appendix to Respondents' Brief in Opposition, 9-10, 14-19, 42, 52-57, 102, 108-112. Respondents also and independently raised as their second ground for relief the federal constitutional ground. Separate Appendix to Respondents' Brief in Opposition, 11-12, 20-28, 43-44, 58-66, 103-104, 113-120. Each of the respondents' Points Relied On raising the state statutory ground as their first ground for reversing one of their two convictions was worded in identical language, but for the particular underlying felony involved. An example follows:

POINT RELIED ON I

> THE TRIAL COURT ERRED IN SENTENCING APPELLANT [RESPONDENT HEREIN] FOR BOTH ROBBERY SECOND DEGREE [THE UNDERLYING FELONY] AND ARMED CRIMINAL ACTION, BECAUSE THE TRIAL COURT HAD NO JURISDICTION TO SENTENCE APPELLANT [RESPONDENT HEREIN] FOR BOTH OFFENSES IN VIOLATION OF SECTIONS 556.041(1) AND 556.046.1(1) R.S.MO. 1978 IN THAT ROBBERY SECOND DEGREE [THE UNDERLYING FELONY] WAS ESTABLISHED BY PROOF OF LESS THAN ALL THE FACTS REQUIRED TO ESTABLISH ARMED CRIMINAL ACTION, THE ONE FACT LESS BEING THE ABSENCE OF A WEAPON.

Separate Appendix to Respondents' Brief in Opposition, 9. Each of the respondents joined with this general argument that one of their two convictions must be reversed the specific argument that under §556.041(3), RSMo 1978, only the underlying felony could be prosecuted and convicted. Separate Appendix to Respondents' Brief in Opposition, 17-19, 55-57, 110-112. Each of the respondents' Points Relied On raising the federal constitutional ground as their second

ground for relief was worded in identical language but for the particular felony involved. An example follows:

POINT RELIED ON II

> THE TRIAL COURT ERRED IN FAILING TO DISMISS COUNT II OF THE INFORMATION ALLEGING ARMED CRIMINAL ACTION BECAUSE THAT COUNT PLACED APPELLANT [RESPONDENT HEREIN] IN DOUBLE JEOPARDY, IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE COMMON LAW OF MISSOURI, BY REASON OF SUBJECTING HIM TO MULTIPLE PUNISHMENT FOR THE SAME OFFENSE, IN THAT ALL THE ELEMENTS OF ROBBERY SECOND DEGREE [THE UNDERLYING FELONY], ALLEGED IN COUNT I OF THE INFORMATION, ARE INCLUDED WITHIN ARMED CRIMINAL ACTION.

Separate Appendix to Respondents' Brief in Opposition, 11.

In respondent Kane's case after submission to the court for decision and in respondent Thompson's case after issuance of the opinion, counsel sent a letter to the clerk of the intermediate state appellate court, bringing to its attention State ex rel. Westfall v. Ruddy, supra, 621 S.W.2d at 42. Separate Appendix to Respondents' Brief in Opposition, 32, 94. By this time, July 27 and 28, 1981, the intermediate state appellate court already had transferred respondent Arnold's case to the Missouri Supreme Court. Brief in Opposition, A2.

The Missouri Court of Appeals in respondent Kane's case accepted the state statutory ground, because it cited Ruddy and not Sours I or Sours II (Haggard had not yet been decided) as the cases controlling both of respondent Kane's arguments (statutory and federal constitutional) for reversing one of his convictions. Kane, supra, 629 S.W.2d at 371. The Missouri Court of Appeals in respondent Thompson's case made no reference to the state statutory ground, but changed its federal constitutional reason to a state statutory one when it transferred the case to the Missouri Supreme Court for the same reason Kane was transferred. Brief in Opposition, A1. The Missouri Court of Appeals in respondent Arnold's case rejected the state statutory ground as "totally without merit," because it was controlled by Sours I and Sours II (Haggard, had not yet been decided). Petition for Certiorari, A70-71. It was this holding upon the state statutory ground in the intermediate state appellate court's opinion in respondent Arnold's case that the Missouri Supreme Court specifically disapproved in Ruddy.

> In State v. Upshaw (Mo. App. 1981) [W.D. No. 31443], and State v. Arnold, a case transferred after opinion by the Missouri Court of Appeals, Western District, now pending in this Court as No. 62999, the court of appeals rejected an argument that, under §§556.041(1) and 556.046.1(1), an accused could not be prosecuted and convicted of the underlying felony and armed criminal action. That holding was not necessary to the result, because the Court of Appeals, in both instances, vacated the armed criminal action conviction and sentence under Sours I and II anyway.

State ex rel. Westfall v. Ruddy, supra, 621 S.W.2d at 45.

This Court "will not review judgments of state courts that rest upon adequate and independent state grounds. ... [Its] only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. ... We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion." Herb v. Pitcairn, 324 U.S. 117, 125-126, 65 S.Ct. 459, 89 L.Ed. 789 (1945).

In summary, then, the petition for a writ of certiorari should be denied, because the decisions below rest upon an adequate and independent state statutory ground, i.e. that §§556.041(1) an §556.046.1(1), RSMo 1978, prohibit conviction for both armed criminal action and the underlying felony, when the underlying felony is established by proof of the same or less than all the facts required to prove armed criminal action. See, State ex rel. West.all v. Ruddy, supra, 621 S.W.2d at 43-45. That the decisions below are based upon this state statutory ground is evidenced by the respondents raising in each of their cases in the intermediate state appellate court both the state statutory and the federal constitutional ground, that court holding in Kane that Ruddy rather than Sours I and Sours II controlled both grounds, and the Missouri Supreme Court's approval of that result. Secondly, it is evidenced by the intermediate state appellate court in Thompson making a federal constitutional holding and subsequently after Ruddy and Kane were decided changing its holding to a state statutory one by transferring the case to the Missouri Supreme Court for the same reason it transferred Kane, and the highest state court approving, as it did in Kane, of the result. Finally, it is evidenced by the intermediate state appellate court making a federal constitutional holding in Arnold and rejecting the

state statutory ground, and the Missouri Supreme Court subsequently specifically disapproving of the intermediate court rejection of the state statutory ground.

2. If this Court cannot determine whether the decisions below rest upon a federal constitutional or on adequate and independent state statutory ground, then counsel requests that it vacate the judgments below and remand the cases to the Missouri Supreme Court to consider whether its judgments rest upon the federal constitution, state statutes, or both grounds.

Petitioner assets that the decisions below, reversing respondents' convictions for armed criminal action, §571.015, RSMo 1978, rest solely upon an erroneous interpretation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution -- a federal constitutional ground. Respondent asserts that the decisions below rest solely or in addition to the federal constitutional ground upon an adequate and independent state statutory ground, i.e. that §§556.041(1) and 556.041.1(1), RSMo 1978, prohibit conviction for armed criminal action and the underlying felony, when the underlying felony is established by proof of the same or less than all the facts required to prove armed criminal action. See, State ex rel. Westfall v. Ruddy, 621 S.W.2d 42, 43-45 (Mo. banc 1981). If this Court cannot determine whether the decisions below rest upon a federal constitutional or an adequate and independent state statutory ground, then counsel requests that this Court vacate the judgments below and remand the cases to the Missouri Supreme Court to consider whether its judgments rest upon the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, or §§556.041(1) and 556.046.1(1), RSMo 1978, or upon both grounds. California v. Krivda, 409 U.S. 33, 35, 93 S.Ct. 32, 34 L.Ed.2d 45 (1972); Illinois v. Vitale, 439 U.S. 974, 99 S.Ct. 554, 58 L.Ed.2d 645 (1978).

3. The decision below in State v. Thompson, 629 S.W.2d 369 (Mo. banc 1982) is not a final judgment under 28 U.S.C. §1257, because the case was remanded for resentencing.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1257, which provides for review by this Court of "[f]inal judgments" rendered by the highest court of a state. The judgment rendered below in respondent Thompson's case reversed and discharged appellant from the armed criminal action conviction, but remanded the case for resentencing upon the underlying felony and a third conviction. State v. Thompson, 629 S.W.2d 369, 370 (Mo. banc 1982); State v. Thompson, 629 S.W.2d 361, 369 (Mo. App. 1981). The judgment rendered below in respondent Thompson's case is not final, since "[something] further remains to be determined by a State court, no matter how disassociated from the only Federal issue that has been adjudicated by the highest court of the State ...." Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124, 65 S.Ct. 1475, 89 L.Ed. 2092 (1945). Petitioner has not asserted that respondent Thompson's case comes within any exception to this rule to make the judgment rendered below final.

IN THE MISSOURI COURT OF APPEALS

WESTERN DISTRICT

STATE OF MISSOURI, Respondent,	)	
V.	)	WD 31513
RAY A. THOMPSON, Appellant.	)	

O R D E R

By unanimous vote of all the judges of the Missouri Court of Appeals, Western District, the above captioned case is hereby transferred to the Supreme Court of Missouri, after opinion, pursuant to Article V, §10 of the Constitution of Missouri for the reasons set forth in the opinion filed in State v. Anthony Kane, WD 31611 (opinion filed August 6, 1981), copy of which is attached hereto and made a part hereof.

Dated this 19th day of August, 1981.

Ronald L. Somerville

RONALD L. SOMERVILLE, CHIEF JUDGE

cc: Gary Gardner
Phil Koppe

IN THE MISSOURI COURT OF APPEALS

WESTERN DISTRICT

STATE OF MISSOURI, Respondent,

v. Jackson WD#31326
Cir. Ct.# CR79-0146

CHARLES ARNOLD, Appellant.

ORDER

NOW ON THIS DAY the Court on its own motion does hereby order that the above-styled cause be and it is hereby transferred to the Missouri Supreme Court because of the general interest and importance of this case pursuant to the provisions of the Constitution of Missouri, Article V, Section 10.

Dated this 30th day of March, 1981.

Solbert H. Wasserstrom

SOLBERT H. WASSERSTROM, CHIEF JUDGE

cc: